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SUPREME COURT, U.S.

NO. 81-5844

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLIE B. BOWEN,

Petitioner

vs.

WALTER F. ZANT, WARDEN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Has petitioner, who under Georgia law waived any issue regarding the composition of the grand jury which indicted him, shown that he was actually prejudiced by its alleged unconstitutional composition?

2. Has petitioner, who under Georgia law waived any issue regarding the composition of the traverse jury before which he was convicted, shown that he was actually prejudiced by its alleged unconstitutional composition?

3. Before his sentencing retrial did petitioner demonstrate that the traverse jury was unconstitutionally composed?

4. Did the trial court before which petitioner was tried for resentencing commit constitutional error in denying petitioner's motion for funds to develop his challenge to the array of the traverse jury?

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STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

On August 22, 1977, the Polk County, Georgia, grand jury indicted petitioner for the rape and murder of Sheila Denise Young. After a jury trial, petitioner was convicted of both rape and murder. He was sentenced to life imprisonment on the rape charge and death on the murder charge. The Georgia Supreme Court upheld petitioner's convictions and life sentence but reversed his death sentence and remanded the case for a new sentencing trial. Bowen v. State, 241 Ga. 492 (1978). After his retrial on the issue of punishment, petitioner was, on September 15, 1978, again sentenced to death. The Georgia Supreme Court affirmed the new death sentence. Bowen v. State, 244 Ga. 495 (1979), cert. denied, 446 U.S. 970.

Subsequently, petitioner filed a petition for the writ of habeas corpus in the Superior Court of Butts County, Georgia. In his petition he raised each of the issues he pursues in this Court. After a hearing, his petition was denied. Bowen v. Zant, Habeas Corpus No. 4780 (Superior Ct. Butts County, March 20, 1981).

B. STATEMENT OF FACTS

A detailed statement of facts can be found in the first opinion of the Georgia Supreme Court. Bowen v. State, 241 Ga. 492 (1978).

SUMMARY OF ARGUMENT

By failing to challenge the array of the grand jury before indictment, petitioner waived any issue as to the constitutionality of its composition. Moreover, he has not demonstrated, as he must in order to qualify for federal relief, that he was actually prejudiced by the composition of the grand jury. By failing to challenge the array of his first traverse jury, petitioner waived any issue as to the constitutionality of its composition. And, he has not demonstrated that he was actually prejudiced by the composition of the jury. Moreover, petitioner failed, in his challenge to the array of his second traverse jury, to show that it was unconstitutionally composed. Finally, petitioner has not shown that the trial court before which he was tried for resentencing, committed any constitutional error in denying a motion for funds. Petitioner has not shown that his challenge to the array of his second traverse jury was rendered defective by his lack of funds on account of his indigency.

ARGUMENT

A. COMPOSITION OF GRAND JURY

Petitioner first raises the composition of the grand jury that indicted him. He contends that adultsages 18-30, women, and blacks were unconstitutionally underrepresented on the jury list from which the grand jury was drawn.

Petitioner, however, waived this issue by failing to raise it before indictment. Under Georgia law, a challenge to the array of a grand jury must be made before indictment unless the defendant is able to show that at the time of indictment he had neither actual nor constructive knowledge of the composition of the grand jury. Otherwise, a defendant waives the issue. Sullivan v. State, 246 Ga. 426, 427 (1980); Godfrey v. State, 243 Ga. 302, 305 (1979), rev'd in part on other grounds, 446 U.S. 420 (1980); Sanders v. State, 235 Ga. 425, 426 (1975). Petitioner was indicted on August 22, 1977, but did not challenge the composition of the grand jury until September 3, 1980, when he filed his state habeas corpus petition.

Unless one who has waived his challenge to the composition of a jury can show that he has suffered actual prejudice, he is not entitled to federal relief. Francis v. Henderson, 425 U.S. 536 (1976). As the Superior Court of Butts County found: "In the instant case Petitioner has not met his burden of showing cause or actual prejudice by a preponderance of the evidence." Bowen v. Zant, supra, slip op. at 17. Moreover, the habeas court found that the failure of petitioner's trial

counsel to challenge the array of his grand jury was not a basis for finding ineffective assistance. Id., slip op. at 6. Petitioner has not raised the effective assistance issue here; the habeas court's finding is, therefore, the law of this case.

For these reasons, then, the court should not grant certiorari on this issue.

B. COMPOSITION OF TRAVERSE JURIES

Petitioner also claims that the traverse juries that convicted him and sentenced him to death were drawn from unconstitutionally composed jury lists.

1. Traverse Jury in Petitioner's First Trial

By failing to challenge the array of the traverse jury that convicted him, petitioner waived his right to raise the issue later. According to Georgia law, a defendant who does not challenge the array of a traverse jury when it is put upon him waives any objection. Hill v. Stynchcombe, 225 Ga. 122, 127 (1969). By failing to challenge the array at that time, petitioner also waived this issue. Francis, supra.

2. Traverse Jury in Petitioner's Retrial

Petitioner's contention that the jury which sentenced him was drawn from an unconstitutionally composed jury list is also without merit. This issue was raised earlier in both the Georgia Supreme Court and this Court. Bowen v. State, 244 Ga. 495, 498-501 (1979), cert. denied, 446 U.S. 970.

In order to prevail on a Sixth Amendment challenge to the composition of a jury list, one must establish a prima facie case consisting of three elements. In the Court's words:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

Petitioner's claim of underrepresentation of young adults does not even meet the first element of a prima facie case. Georgia courts have consistently held that age groups are not identifiable or cognizable groups for jury composition analysis. Barrow v. State, 239 Ga. 162, 164 (1977); State v. Davis, 241 Ga. 376 (1978). Other courts have agreed. E.g., United States v. Diggs, 522 F.2d 1310, 1317 n. 12 (D.C. Cir. 1975), cert. denied sub nom., Floyd v. United States, 429 U.S. 852 (1976). Petitioner has advanced no reason to overturn this authority.

Petitioner's claim that women and blacks were underrepresented is more cogent but, nevertheless, ultimately unsuccessful. Women and blacks are, of course, distinctive community groups within the meaning of Duren. Swain v. Alabama, 380 U.S. 202 (1965); Taylor v. Louisiana, 459 U.S. 522 (1975). In view of the above-mentioned timeliness standard for filing a challenge to the array of a traverse jury, only those figures presented to the trial court at the time the challenge was made should be considered. The statistics testified to at the habeas hearing are irrelevant. The appropriate figures are set out

in the last opinion of the Georgia Supreme Court--54.2% women in the population and 29.5% women on the traverse jury list; 13.7% blacks in the population and 6.2% blacks on the jury list. Moreover, when the challenge was presented to the trial court 152 names on the jury list were unclassified. Bowen v. State, 244 Ga. at 499-501.

In veiw of the unclassified names in the presentation of the challenge to the trial court, petitioner failed to satisfy the second element of a prima facie case. The second element required of petitioner a showing that the representation of blacks and women was "not fair and reasonable in relation to the number of such persons in the community." Duren, supra, at 360. The trial court, the Georgia Supreme Court, and the habeas court all found that the failure to identify the race and sex of these 152 persons rendered the challenge defective. The habeas court also found that even at the habeas hearing, petitioner failed to establish the relevant characteristics of these persons. The habeas court also found that petitioner's trial counsel did not render ineffective assistance by failing to adequately present the challenge to the array. Bowen v. Zant, slip op. at 8-10. Petitioner has not presented the effective assistance finding to this Court. Manifestly, these lower courts were correct. The Georgia Supreme Court properly held that the evidence of underrepresentation was inconclusive. In Sanders v. State, 235 Ga. 425, 427-30 (1975), cert. denied, 425 U.S. 976, the Georgia Supreme Court similarly held that the failure to clearly identify the race and sex of all the persons on the jury list rendered the challenge defective.

Petitioner also failed to meet the third element of a prima facie case. He has not shown that any underrepresentation was due to systematic exclusion of women and blacks in the jury selection process.

To the extent that petitioner states an equal protection claim, it is successfully rebutted by evidence of good faith efforts to compose a jury list made up of a fair cross-section and evidence of the absence of any discriminatory purpose. The Court has held that such rebuttal evidence is significant for refuting an equal protection challenge to the composition of a jury. Duren, supra, at 368, n. 26, and cases cited therein. The Georgia Supreme Court has held with regard to the jury list from which the petitioner's sentencing jury was drawn, that petitioner failed in his original challenge to show discriminatory purpose. The court pointed out: that one of the six jury commissioners of Polk County was a white female and one a black male, that the voter registration list used to compose the jury list had no racial designations, that no one was excluded from the jury list because of race or sex, and that it was the aim of the commissioners to secure a fair cross-section. Petitioner offered no evidence in the hearing before the habeas court which would cast doubt on any of these points. Therefore, petitioner's equal protection challenge is without merit.

It should also be pointed out that petitioner's trial counsel, who was held to have rendered effective assistance, was satisfied with, and actually knew some of the persons on, the sentencing traverse jury. (H.T. [Habeas Transcript] 96).

For all of these reasons, the Court should deny certiorari on this issue, just as it did in the direct appeal.

C. MOTION FOR FUNDS

In the final question which petitioner presents to the Court, he contends that the trial court committed constitutional error in denying a motion for defense funds to develop a challenge to the array of the sentencing traverse jury. This contention is apparently a fall back position: petitioner argues that if the presentation of the challenge to the array was properly found to be defective, it was due to the trial court's denial of a request for funds.

Petitioner has made no showing that the denial of funds with which to investigate the composition of the jury list caused the defective presentation of the challenge. Petitioner's trial counsel testified that the failure to determine the sex and race of all the persons on the traverse jury list was a result of his underestimating the research time required and an inadvertent mistake by his secretary. (HT. 95, 99). Moreover, he testified that he expected to be paid for the time his secretary spent researching the jury list. (HT. 97-98). Also petitioner had the benefit, apparently without expense to himself or his trial counsel, of an expert statistician. (HT. 94-95). It should also be noted that the trial court did grant at least one other motion for funds--namely, one for the payment of an expert witness for psychological testing of petitioner. (HT. 93).

Georgia courts have consistently held that the provision of monies to an indigent defendant for investigation and expert witnesses is within the discretion of a trial court. Whitaker v. State, 246 Ga. 163, 164 (1980). Especially in view of his failure to suggest how he was harmed, petitioner has not shown any abuse of discretion.

For these reasons, the court should not grant certiorari on this question.

CONCLUSION

The instant petition should not be granted because the Superior Court of Butts County has not "decided a federal question in a way in conflict with applicable decisions of this Court" nor do any other "special and important reasons" militate in favor of review. S. Ct. Rules 17.

Respectfully submitted,

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CERTIFICATE OF FILING UNDER RULE 28

I, George M. Weaver, a Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on January 8, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

George M. Weaver
GEORGE M. WEAVER

Sworn to and subscribed before me
this 8th day of January 1982.

Janice Wilson
NOTARY PUBLIC

My Commission Expires: August 1985